



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

---

In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

[REDACTED]

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed June 08, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by ContinuUs in regard to petitioner's Family Care Program (FCP) eligibility, a telephonic hearing was held on July 22, 2015, at Monroe, Wisconsin. At the request of the parties, the record was held open for the submission of consecutive briefs to the Division of Hearings and Appeals (DHA) and the other party. The petitioner's responsive brief was late, but was accepted into the hearing record with also additional time granted to ContinuUs for its reply brief. The parties' briefs are received into the hearing record.

The issue for determination is whether the Family Care Program (FCP) correctly discontinued the petitioner's FCP eligibility effective April 30, 2015, due to improvements in his ADLs and IADLs resulting in no longer meeting the Nursing Home Level of Care.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED] supervisor  
ContinuUs Family Care agency  
28526 US Hwy 14  
Lone Rock, WI 53556

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

## **FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a 48 year old resident of Green County who resides independently in his home.
2. The petitioner is diagnosed with cancer of the tongue along with being found disabled as of February 1, 2013, Anemia, Hematoma of Auricle of Pinna; Lumbago, Lichen Planus; Inguinal Hernia; umbilical hernia; migraines; panic disorder; bipolar; depression; and weight loss.
3. The petitioner has been enrolled in the Family Care Program (FCP).
4. The petitioner was determined to meet the nursing home level of care in his April 30, 2014 screening by ContinuUs Family Care. Attachment #5.
5. The ContinuUs Family Care team met with petitioner on April 10, 2015 for his annual Long Care Term Functional Screen (LTCFS). The FC functional screener, RN [REDACTED], completed petitioner's functional screening concluding that petitioner was no longer functionally eligible for the nursing home level of care due to improvements in his functional abilities. The petitioner has improved in the following activities of daily living (ADLs) and instrumental activities of daily living (IADLs): a) he is now independent with dressing; b) he is able to eat and prepare foods, but with some difficulty and requires his attention to avoid the possible risk of choking. Petitioner did have partial tongue amputation and there are some paralyzed muscles in his throat from the radiation to that area. Petitioner does not have any cognitive limitation, and thus understands what foods he is able to eat and how to prepare those foods to minimize any choking possibility; c) petitioner is physically and cognitively able to use the microwave, stove, oven and toaster to cook meals, but prefers to eat Ensure; d) tube feedings have been removed; e) petitioner is no longer at risk of being institutionalized as his health has improved; f) petitioner is physically strong enough to independently carry three separate bundles containing 3 cans of Ensure into his home; and g) petitioner is cognitively and physically able to pursue some employment.
6. The ContinuUs Family Care sent an April 14, 2015 notice to the petitioner stating that based upon his functional screen petitioner was determined to no longer meet the nursing home level of care to continue eligibility in the Family Care Program effective April 30, 2015.
7. Petitioner requested a re-screening. As a result of the in-home rescreening on May 8, 2015 of the petitioner by screener, [REDACTED], the Family Care program again determined that the petitioner was no longer functionally eligible for the nursing home level of care due to improvements in his functional abilities.
8. ContinuUs sent July 29, 2015 and August 26, 2015 closing arguments which persuasively argued that even after the re-screening, petitioner failed to satisfy the nursing home level of care functional eligibility requirements of the FCP program, and thus was no longer eligible for continued FCP benefits.
9. The petitioner sent an August 11, 2015 responsive closing statement to DHA which was unable to refute with any reliable information that he no longer met the nursing home level of care requirement for continued nursing home eligibility in the Family Care program as of May 8, 2015 re-screening.

## **DISCUSSION**

The Family Care program, which is supervised by the Department of Health Services (DHS), is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Adm. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms “nursing home” and “non-nursing home” levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, he/she is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). Wis. Adm. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, he/she is eligible for full services only if he is in need of adult protective services, he is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). Wis. Adm. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

The Wisconsin Department of Health Services made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener. The screener met with the petitioner as part of the reassessment process. Current policy requires the Department’s local agent/screener to then enter this data into the Department’s functional screen computer program. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The Level of Care (LOC) Functional Screen form and program reiterate the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

Wis. Admin. Code § DHS 10.33(2)(c) describes comprehensive (a/k/a nursing home) functional capacity:

**(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY.**

**(a) *Determination.*** Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, ...

**(c) *Comprehensive functional capacity level.*** A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

[REDACTED]

During the July 22, 2015 hearing and in their August 11, 2015 closing argument, petitioner and his sister [REDACTED] explained that petitioner has many medical and mental health problems, as indicated in Finding of Fact #2 above. In addition, petitioner's sister argued that petitioner has lost weight and is only about 145 pounds and is 6 foot 2 inches tall. The petitioner does have many medical and mental health problems and he is under weight for his height. However, neither petitioner nor his sister were able to provide any evidence to refute that [REDACTED] has improved in his ADLs and IADLs, as indicated in Finding of Fact #5 above.

As evidenced by the re-screening on May 8, 2015 (and the April 10, 2015 initial screen), the petitioner no longer falls within the comprehensive functional capacity definition – that he meets any of the above required levels to be unable to safely/appropriately perform any of the above combinations of ADL's and/or IADLs (under item 2(c) above). Thus, per code, he does not meet the comprehensive/nursing home level of care. The screening personnel correctly followed their DHS instructions. Accordingly, based upon the above, I must conclude that the Family Care Program correctly determined that the petitioner no longer meets the nursing home level of care requirement for continued nursing home eligibility in the Family Care program as of April 30, 2015.

### **CONCLUSIONS OF LAW**

The Family Care Program (FCP) correctly discontinued the petitioner's FCP eligibility effective April 30, 2015, due to improvements in his ADLs and IADLs resulting in no longer meeting the Nursing Home Level of Care.

**THEREFORE, it is**

**ORDERED**

The petition for review herein be and the same is hereby Dismissed.

### **REQUEST FOR A REHEARING**


You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

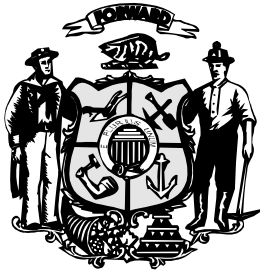
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

  
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 22nd day of October, 2015

---

\sGary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals



## State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 22, 2015.

Continuus  
Office of Family Care Expansion  
Health Care Access and Accountability